Supreme Court, U.S.
FILED
AUG 25 1997
CLERK

No. 97-148

In The

Supreme Court of the United States

October Term, 1996

THE ARIZONA DEPARTMENT OF CORRECTIONS, *et al.*,

Petitioners,

v.

EVAN ARTHUR HOOK, *et al.*,

Respondents.

On Petition For Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

In a civil rights case, may a state exempt itself from paying special master fees assessed under Rule 53 of the Federal Rules of Civil Procedure?[1]

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[1] In addition to affirming the District Court's order striking down A.R.S. § 35-152 as unconstitutional, the Ninth Circuit affirmed the District Court's ruling holding Petitioner Sam Lewis in contempt. The Petition for Writ of Certiorari does not challenge the decision on the contempt issue and therefore we do not address it.

PARTIES TO THE PROCEEDING BELOW

Respondents agree with Petitioners' statement of parties to the proceedings below. This Brief in Opposition to the Petition for Writ of Certiorari is filed on behalf of the plaintiff/inmate classes in *Hook v. State of Arizona*, District Court No. CIV 93-0097 PHX CAM and *Gluth v. Ariz. Department of Corrections*, District Court No. CIV 84-1626 PHX CAM. A separate Brief in Opposition to Petition for Writ of Certiorari has been filed on behalf of the plaintiff/inmate class in *Casey v. Lewis*, District Court No. CIV 90-0054 PHX CAM (the "*Casey* brief").

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STATEMENT OF THE CASE

A. General Litigation and Background.

1. Gluth Litigation.

Gluth v. Kangas was brought in 1987 by Arizona Department of Corrections ("ADOC") prisoners claiming they were being denied their constitutional right of access to the courts. The district court granted summary judgment for the prisoners. *Gluth v. Kangas*, 773 F. Supp. 1309 (D. Ariz. 1988), *aff'd*, 951 F.2d 1504 (9th Cir. 1991). Thereafter, the district court entered an injunction mandating improvement to the prison library operation and, pursuant to Fed. R. Civ. P. 53(a), appointing a special master to monitor Petitioners' compliance with the injunction. *Arizona Dept. of Corrections v. Hook, et al.* Appendix to Petition for Writ of Certiorari ("Pet. App.") C at 44. The District Court also ordered the State to pay the fees and costs of the special master. Pet. App. A at 9. While Petitioners appealed the scope of the injunction, they did not oppose the portion of the injunction assessing the State with the special master's fees and costs. *Gluth v. Kangas*, 951 F.2d 1504 (9th Cir. 1991).

2. Hook Litigation.

The *Hook* complaint, filed in 1973, alleged constitutional violations relating to ADOC inmate mail. Shortly after the complaint was filed, the parties settled the dispute with a consent decree regulating inmate access to mail, magazines, and Christmas packages. In the early 1990's, after many years of relative harmony in implementing the consent decree, Petitioner Lewis began violating both the decree and associated orders. These violations are all well documented in several published opinions in this case. *See Hook v. Arizona*, 972 F.2d 1012 (9th Cir. 1992); *Hook v. Arizona*, 107 F.3d 1397 (9th Cir. 1997); and *Hook v. Arizona*, No. 95-15897, slip op. 8495 (9th Cir. July 17, 1997).

Faced with this history of Petitioners' non-compliance with the consent decree and the court's lack of resources to investigate the many alleged violations of the consent decree, the District Court appointed a special master pursuant to Rule 53(a) of the Federal Rules of Civil Procedure. The appointment order requires Petitioners to pay the special master's fees and expenses on the same time table as in *Gluth*.[2]

3. *The Arizona Statute and the Motions for Modification and for Contempt.*

In summary, after the special master orders were entered and after the State had paid some special master's fees and costs, the Arizona Legislature passed Ariz. Rev. Stat. § 35-152 which prohibits the payment without legislative approval of fees and costs for special masters appointed by the federal courts. The statute was passed at the urging of Petitioner Lewis, who was looking for a showdown with the Federal District Court. Pet. App. C at 49.

In August 1995, Petitioners failed to pay the special master as ordered. On the day the payment was due, Petitioners filed a motion to modify the injunctions and consent decree to relieve themselves of the special master payment obligation. The motion did *not* request or suggest that the special master be replaced by a magistrate judge; only that no special master payment be required unless approved by the legislature pursuant to section 35-152. Petitioners failed to offer a valid reason why the modification motion was not filed before Petitioners ceased payments to the special masters. Pet. App. C at 70 n.32.

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[2] A brief in opposition to Petitioners' Petition for Writ of Certiorari has also been filed by Respondents Casey et al. (the "*Casey* brief"). The *Hook* and *Gluth* respondents adopt and incorporate by reference the portions of the *Casey* brief discussing the enactment of A.R.S. § 35-152, and the subsequent contempt proceeding (*Casey* brief at pp 4 through 6).

Two days later, Respondents filed motions to have Petitioner Sam Lewis held in contempt for failing to pay the special master's fees and costs as previously ordered by the District Court. Judge Muecke, the judge presiding over the case, recused himself from the contempt and modification motions, and District Court Judge David Ezra was appointed to decide them. He denied the motion to modify, ruled Ariz. Rev. Stat. § 35-152 unconstitutional and held Petitioner Lewis in contempt.

4. Current Status of Litigation.

Thereafter, Petitioners appealed the District Court's rulings to the Ninth Circuit. The Ninth Circuit affirmed *all* aspects of those rulings. Meanwhile, in both *Gluth* and *Hook*, Petitioners have moved in District Court to vacate the underlying injunction and consent decrees and the orders for payment of the special masters. Defendants' Rule 60(b)(5) and 18 U.S.C. § 3626(b) Motion to Vacate Judgment and Terminate Final Permanent Injunction, *Gluth v. Arizona* (D. Ariz. No. CIV 84-1626 PHX PGR, filed Mar. 11, 1997, case docket no. 534); Defendants' Motion for Termination of Orders Requiring Payment of Special Master Fees and Costs and Allowing Ex Parte Contacts, *Hook v. Arizona* (D. Ariz. No. CIV-73-97 PHX CAM, filed May 13, 1996, case docket no. 542); Motion to Terminate Consent Decree, *Hook v. Arizona* (D. Ariz. No. CIV-73-0097 PHX SMM, filed Aug. 15, 1996, case docket no. 563); Motion for Expedited Consideration of Defendants' Motion for Termination of Orders Requiring Payment of Special Master Fees and Costs and Allowing Ex Parte Contacts, *Hook v. Arizona* (D. Ariz. No. CIV-73-0097 PHX SMM, filed Aug. 15, 1996, case docket no. 562).

I. ARGUMENT

The fundamental premise of Petitioners' argument is that the doctrines of federalism and comity allow the State to nullify the federal court's order that the State pay special master fees assessed pursuant to Federal Rule of Civil Procedure Rule 53. However, those

doctrines have no application to the question whether a district court can assess costs against states in civil rights cases.

Comity and federalism come into play only when a federal court enters an equitable decree that displaces or interferes with traditional state administrative functions. An order requiring the state to pay special master fees does not displace or interfere with any state functions; it is merely a taxation of costs to which states -- like any other litigant -- are subject.

This Court clearly held in *Hutto v. Finney*, 437 U.S. 678 (1978), that in civil rights cases costs may be awarded against a state. The Court specifically held that neither the Eleventh Amendment nor federalism bars assessing costs against states in cases brought to enforce the Civil Rights Act. *Id.* at 691. That is because neither federalism nor comity comes into play in awarding costs. Those doctrines arise in cases where district courts enter orders directing a state how to administer the prison system. As the Court held in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), in the context of prison condition cases, comity means "giving the states the first opportunity to correct the errors made in the internal administration of their prisons." *Id.* at 492; *see also Casey v. Lewis*, 116 S. Ct. 2174, 2185 (1996) (holding that comity required that the District Court first allow the state to come forth with a constitutionally sound program as to how the prisons should be administered rather than first dictating what course the State should follow).

In other words, comity and federalism require the federal court to defer to the State in deciding how the State prison system should be run. They do not require the federal court to defer to the State in deciding how the federal district court should be run.

Appointing a special master and ordering the State to pay the special master's fees and costs are not remedies at all. The remedies are the underlying injunction and consent decree. The special master is merely a procedural device for monitoring compliance with those remedies. The court in *Stone v. City and County of San Francisco*,

968 F.2d 850, 861 (9th Cir. 1992), *cert. denied*, 506 U.S. 1081 (1993), has recognized this point. The district court in *Stone* appointed a special master to report to the court on the defendants' compliance with a consent decree regulating jail overcrowding. The Ninth Circuit rejected the assertion that appointment of a special master presented comity or federalism concerns:

> The *amicus* also argues that the appointment of a special master raises federalism concerns, but this claim does not deserve serious consideration. Federal courts repeatedly have approved the use of special masters to monitor compliance with court orders and consent decrees.
>
> The Special Master has no authority to interfere with the operation of the City's jails. The district court appointed the Special Master to investigate, report, and recommend actions that the City could take to insure compliance with the consent decree. The City agreed to his appointment.

Id. at 968 F.2d at 859 n.18 (citations omitted).

Stone is a natural outgrowth of and consistent with this Court's decision in *Hutto*, holding that federal courts have full authority to tax costs against a state. Such taxation does not entail "interference in legitimate state activities. . . ." *Stone*, 968 F.2d at 861. It merely treats the Petitioner as any other litigant in the assessment of costs.

Petitioners do not state why or how assessing the State for the costs of the special master interferes with Petitioners' ability to administer the State prison system. Citing *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 392-93 (1992), Petitioners claim that "financial constraints" placed on states can implicate comity principles. However, Petitioners never explain how the special master cost assessment constrains them in running the prison system.

Their argument certainly finds no support in *Rufo*. *Rufo never* addresses the issue of assessing costs in a civil rights case against a state, and nothing in the opinion suggests that awarding costs against a state undermines principles of comity or federalism. Indeed, as is more fully explained in the *Casey* brief, Petitioners' motion to modify was correctly denied because the *Rufo* standards were not met. The discussion in *Rufo* regarding "financial constraint" relates the portion of the consent decree that required the sheriff of Suffolk County to build a new jail, *i.e.*, the provision bore directly on an administrative function of the local government.

Petitioners' statement that:

> [I]f a court has a choice of adequate remedial methods for enforcing federal rights, one of which does not conflict with state law, it *must* choose the remedial method that does not override the State's sovereignty. In other words, if federal and state law can co-exist, federal courts are obliged to ensure that they do exist. (Petition at 14.)

certainly has no support in the case law as it relates to imposing costs. Indeed, Petitioner's statement of the issue is exactly backwards. The federal court did not "override" any state law. Rather, it was the State, through the enactment of section 35-152, that attempted to override and nullify the District Court's special master payment orders. *See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 685, 695 (1979) ("State-law prohibition against compliance with the District Court's decree cannot survive the command of the Supremacy Clause").

Section 35-152 not only sought to nullify the District Court's orders, it purported to eviscerate Federal Rule of Civil Procedure 53(a), the rule underlying the order. Rule 53(a) empowers federal courts to tax the costs of a special master against the parties. Section 35-152 attempts to take that power away from the federal courts by giving the state legislature complete discretion to decide whether to

pay and how much to pay special masters. Such a direct conflict with federal laws is a classic Supremacy Clause violation. *Washington State Commercial Passengers*, 443 U.S. at 695; *Clark v. Coye*, 60 F.3d 600, 603 (9th Cir. 1995) ("It has long been established that 'a state statute is void to the extent that it actually conflicts with a valid federal statute'").

The absurdity of Petitioners' argument is reflected by the erroneous conclusions to which it would lead. For example, under Petitioners' view, because there is no absolute right to an award of attorneys' fees in civil rights cases, a state could properly enact a statute prohibiting its employees from paying attorneys' fees in federal court. Such a statute, however, would nullify the holding in *Hutto*.

Likewise, because the federal rules of civil procedure provide several means of discovery, a state could properly enact a statute prohibiting its employees from appearing at depositions or producing documents as long as interrogatories were available. As the District Court concluded, "Defendant's argument has no logical stopping point." Pet. App. C at 55-56.

Indeed, what is perhaps most ironic about Petitioners' argument that the District Court should have modified Judge Muecke's orders by replacing the special masters with magistrate judges is that, at bottom, the argument has *nothing* to do with conforming to or "harmonizing" with a change in state law. Section 35-152, after all, says absolutely nothing about magistrate judges. Rather, conformance with that statute would have required the District Court to modify the special master payment orders by leaving payments to the whim of the state legislature.

II. THE CASE PRESENTS NO ISSUE WORTHY OF REVIEW

There is no conflict among the circuits, much less a conflict that would justify granting a writ of certiorari. The *Hook* and *Gluth* Respondents adopt that portion of the *Casey* brief entitled "This Case

Presents No Issue Worthy of Review by Writ of Certiorari" on this point.

Furthermore, in light of the motions pending in District Court to vacate the orders giving rise to the appointment of the special master, there is no reason for this Court to address Petitioners' arguments at this time. If the District Court decides in these cases that no special master is warranted, then this Court should never reach the issue of assessing the costs to the special master against the State.

The Petition for Writ of Certiorari raises no important or novel issue. The simple question it raises is whether the State can be assessed special master's fees in Civil Rights Act cases. This Court has long held that states are subject to assessment of costs in federal litigation just as any other party. There is no reason to waiver from that precedent.

CONCLUSION

Respondents respectfully urge the Court to deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RESPECTFULLY SUBMITTED this 25th day of August, 1997.

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